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19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 COLUMBIA PICTURES
22 INDUSTRIES, INC., *et. al.*

23 *Plaintiffs,*

24 v.

25 GARY FUNG, *et. al.*

26 *Defendants.*

DISCOVERY MATTER

The Honorable Jacqueline Chooljian

Case No. CV-06-05578 SVW (JCx)

**SUPPLEMENTAL BRIEF IN
FURTHER SUPPORT OF
PLAINTIFFS' *EX PARTE*
APPLICATION FOR
EVIDENTIARY SANCTIONS FOR
VIOLATION OF THE
COURT'S JUNE 8, 2007 ORDER—
FEES REQUESTED**

FILED UNDER SEAL, PURSUANT
TO PROTECTIVE ORDER DATED
JANUARY 11, 2007

1 During the September 13, 2013 hearing, the Court inquired as to what the
2 website data recently produced by Defendants, reflecting downloads from May 2008
3 to April 2010 (the "Late-Produced Website Data"), revealed about the volume of
4 infringing downloads of Plaintiffs' copyrighted works by Defendants' users in the
5 United States. The Court indicated that, if it granted Plaintiffs' request for
6 evidentiary sanctions, this information might enable the Court to better fashion a
7 sanction for Defendants' admitted spoliation of website data from July 2007 to May
8 2008 (the "Despoiled Website Data"). By extrapolating from actual data from the
9 Late-Produced Website Data, the Court could satisfy itself as to the reasonableness
10 of the requested evidentiary sanctions related to the missing Despoiled Website
11 Data.

12 As they indicated they would do at the hearing, Plaintiffs hereby submit the
13 additional information that was the subject of the Court's inquiry.

14 **REQUESTED DATA**

15 Plaintiffs have conducted a preliminary analysis of the Late-Produced
16 Website Data and have calculated the average number of times dot-torrent files for
17 Plaintiffs' works-in-suit were downloaded by Defendants' users in the United States
18 on a monthly basis.¹

19 As set forth in Exhibit A, the results of this analysis demonstrate that: (i) the
20 Top 25 most downloaded dot-torrent files for Plaintiffs' works-in-suit were
21 downloaded [REDACTED] by users in the United States; (ii) the Top
22 50 most downloaded dot-torrent files for Plaintiffs' works-in-suit were downloaded
23 [REDACTED] by users in the United States; (iii) the Top 100 most

24
25 ¹ On September 16, 2013, Plaintiffs filed a list of 4,145 works for which they intend
26 to seek monetary relief at the upcoming November 5, 2013 damages trial. *See*
27 Notice of Filing of List of Works in Suit Pursuant to the Court's August 7, 2013
28 Order (ECF No. 604).

1 downloaded dot-torrent files for Plaintiffs' works-in-suit were downloaded [REDACTED]
2 [REDACTED] by users in the United States. Additionally, just the Top 50 most
3 downloaded dot-torrent files for Plaintiffs' works were downloaded a total of
4 approximately [REDACTED] by United States users in less than a two-year
5 period.²

6 Based on the foregoing, Plaintiffs have requested as their Evidentiary
7 Sanction No. 2 that it be established that "each dot-torrent file corresponding to one
8 of Plaintiffs' copyrighted works that has appeared on a Fung Website [from July
9 2007 through May 2008] . . . was downloaded at least 2,000 times per month by
10 users of the Fung Websites in the United States." *Ex Parte* Application at 10-11.

11 As reflected by the Late-Produced Website Data, if Defendants had complied
12 with the Server Log Order, the Despoiled Website Data would have evidenced
13 millions of additional downloads of Plaintiffs' works by Defendants' users in the
14 United States from July 2007 to May 2008. Plaintiffs' Evidentiary Sanction No. 2,
15 which seeks to establish 2,000 downloads per month for this time period, is entirely
16 consistent with (and, in fact, more conservative than) the actual volume of
17 downloads as reflected in the Late-Produced Website Data.

18 If the Court were to grant the sanction as Plaintiffs have proposed, Plaintiffs
19 would identify dot-torrent files for Plaintiffs' copyrighted works that appeared on
20 the Fung Websites between June 2007 and May 2008. For each such dot-torrent
21 file, by virtue of the proposed Sanction No. 2, it would be conclusively established
22

23 ² Given Defendants' untimely production of the Late-Produced Website Data,
24 Plaintiffs have not had the opportunity to fully analyze this data to identify all dot-
25 torrent files for Plaintiffs' copyrighted works. Because there are often multiple dot-
26 torrent files for each of Plaintiffs' works, it is possible, and indeed likely, that the
27 numbers outlined herein underestimate the total downloads of dot-torrent files in the
28 United States during the infringement period.

1 that the dot-torrent file was “downloaded at least 2,000 times per month by users of
2 the Fung Websites in the United States.”

3 The data provided herein is of course also highly relevant to the Court’s
4 consideration of Plaintiffs’ requested Evidentiary Sanction No. 1. For each dot-
5 torrent file for Plaintiffs’ copyrighted works available on the Fung Websites
6 between July 2007 and May 2008, Plaintiffs’ requested Sanction No. 1 would deem
7 direct infringement by a U.S. user to be conclusively established. Judge Wilson has
8 ruled that Plaintiffs establish direct infringement by showing the downloading by a
9 Fung Website user in the U.S. of a dot-torrent file for one of Plaintiffs’ copyrighted
10 works. *See* August 7, 2013 Order at 2-4 (ECF No. 554). The actual data, as
11 reflected in the Late-Produced Website Data, demonstrates the reasonableness of
12 Plaintiffs’ requested Evidentiary Sanction No. 1. Dot-torrent files for Plaintiffs’
13 works were downloaded *thousands of times* by Defendants’ users in the United
14 States. Had Defendants produced the Despoiled Website Data as ordered by this
15 Court, that data would have conclusively proven downloads of dot-torrent files for
16 Plaintiffs’ works by users in the United States – and, thus, direct infringement under
17 the standard set by Judge Wilson. The requested Evidentiary Sanction No. 1 only
18 asks the Court to put Plaintiffs in the same position they would have been in had
19 Defendants complied with the Server Log Order.

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1 Dated: September 19, 2013

2 Respectfully submitted,

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4 By: 
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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, a copy of Plaintiffs' Supplemental Brief in Further Support of Plaintiffs' *Ex Parte* Application for Evidentiary Sanctions for Violation of the Court's June 8, 2007 Order [REDACTED], along with a redacted version of the accompanying exhibit, were sent electronically to the attorneys listed below.

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